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No. 84-1543

In the Supreme Court of the United States

October Term, 1984

PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
Petitioner,
v.
HOWARD H. HUMPHRIES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Brief of Amici Curiae in Support of Petition for a Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

May Pennsylvania Rule of Civil Procedure Number 238, which mandates an award of 10% prejudgment interest, be applied in a Federal Employers' Liability Act action brought in the courts of the Commonwealth of Pennsylvania?

INTEREST OF THE AMICI CURIAE

The Baltimore and Ohio Railroad Company and Consolidated Rail Corporation are common carriers by railroad who engage in interstate commerce in Pennsylvania. In the course of their operations *amici curiae* are defendants in numerous Federal Employers' Liability Act actions brought in the courts of the Commonwealth of Pennsylvania.

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SUMMARY OF ARGUMENT

Matters pertaining to the measure of damages in Federal Employers' Liability Act actions present questions of federal law. Prejudgment interest represents an element of damages the award of which, therefore, is determined by federal law. There is a strong federal interest in maintaining the uniformity of the measure of damages awarded under the Federal Employers' Liability Act (FELA). That act does not provide for the award of prejudgment interest. Nor does its legislative history indicate a congressional intent to permit such an award. From the passage of the Act until 1984 an unbroken line of federal and state court decisions uniformly held that prejudgment interest could not be awarded in FELA actions. Denial of prejudgment interest is consistent with Congress' considered allocation of rights and burdens to parties subject to the FELA. A writ of certiorari to the Superior Court of Pennsylvania should be granted in order to preserve this allocation by Congress and to maintain a uniform measure of damages in Federal Employers' Liability Act actions.

ARGUMENT

The Federal Employers' Liability Act, 45 U.S.C. §51, *et seq.*, Act of April 22, 1908, 35 Stat. 65, as amended, governs personal injury claims of railroad workers against their employers. Thousands of FELA actions are filed annually in the federal and state courts, which share concurrent jurisdiction over those actions. Every year railroads pay hundreds of millions of dollars to FELA claimants. The provisions of the FELA have also been incorporated by reference to govern personal injury claims by seamen under the Jones Act, 46 U.S.C. §688, Act of March 4, 1915, 38 Stat. 1185, as amended.

"It has long been settled that questions concerning the measure of damages in a FELA action are federal in character." *Norfolk & Western R. Co. v. Leipelt*, 444 U.S. 490, 492, 100 S. Ct. 755, 62 L.Ed.2d 689 (1980). "One of the purposes of [the FELA] was to 'create uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees." *Leipelt, supra*, 444 U.S. 493, n.5. This Court recently manifested its continuing concern that a uniform measure of damages be maintained in *St. Louis Southwestern R. Co. v. Dickerson*, U.S. , 105 S. Ct. 1347, L.Ed. (1985).

From the time that the present Federal Employers' Liability Act was enacted in 1908 until 1984, federal and state courts uniformly held that: (1) assessment of prejudgment interest raised a substantive issue of damages controlled by federal law; and (2) federal law did not permit the application of state statutes or rules of court to award prejudgment interest in FELA actions.[1] The Pennsylvania

[1] *Louisiana & Arkansas Ry. v. Pratt*, 142 F.2d 847 (5th Cir. 1944), *Murphy v. Lehigh Valley R.R.*, 63 F. Supp. 928 (E.D.N.Y. 1945), aff'd

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Superior Court's decision in the present action repudiates that line of authority and ignores this Court's clear and often repeated pronouncements concerning the desirability of uniform application of substantive aspects of the FELA.

The FELA does not provide for the award of prejudgment interest. Nor does the legislative history of either the original version of the present FELA or of amendments thereto indicate that congressional silence on the matter should be construed as authority to permit an award of prejudgment interest. Faced with these facts, the Superior Court of Pennsylvania purported to find authority for its unprecedented holding in the general federal interest statute. 28 U.S.C. §1961, Act of June 25, 1948, 62 Stat. 957 which until amended in 1982 provided in relevant part:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.[2]

Although 28 U.S.C. §1961 provides only for interest from the date of entry of judgment, this Court has held

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158 F.2d 481 (2nd Cir. 1946), *Briggs v. Pa. R.R.*, 164 F.2d 21 (2nd Cir. 1947), aff'd on other grounds 334 U.S. 304, 68 S. Ct. 609 (1948), *Chicago, M., St. P., & P.R.R. v. Busby*, 41 F.2d 617 (9th Cir. 1930), *Kozar v. Chesapeake & Ohio R.R.*, 449 F.2d 1238 (6th Cir. 1971), *Faulkenberry v. Louisiana & Arkansas Ry.*, 551 F.2d 650 (5th Cir. 1977), *Wicks v. Central Railroad Co. of N.J.*, 129 N.J. Super. 145, 322 A.2d 488 (1974), *cert. denied* 66 N.J. 317, 331 A.2d 17 (1974), *Felder v. Union Pacific Railroad Co.*, 660 P.2d 911 (Colo. App. 1982), *Bennett v. Atchison, T & S.F. Ry. Co.*, 174 N.W. 805 (Iowa, 1919), *Murman v. New York, N.H. & H.R.*, 258 N.Y. 447, 180 N.E. 114 (1932). Federal and state courts applying the FELA to Jones Act claims also unanimously held that prejudgment interest could not be recovered.

[2]The Pennsylvania Superior Court chose not to consider the present text which reads:

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that §1961 may authorize an award of prejudgment interest depending upon Congress' purpose in enacting the statute under which the case arises and upon general equitable principles. *Rogers v. United States,* 332 U.S. 371, 373, 68 S. Ct. 5, 92 L.Ed.3 (1947). The Pennsylvania Superior Court's discussion of 28 U.S.C. §1961 is devoid of the type of analysis required by *Rogers v. United States.* To the contrary, the Superior Court's opinion bespeaks a parochial concern for jealously upholding the integrity of the law of the forum jurisdiction which concern is totally at odds with the principle of uniformity which is the polestar for the determination of substantive provisions of the FELA.

Two recent federal district court decisions which did apply the proper analysis of 28 U.S.C. §1961 concluded that Pennsylvania Rule of Civil Procedure 238 should not be applied in FELA actions. *Camplese v. Consolidated Rail Corporation,* 594 F. Supp. 44 (M.D. Pa. 1984), *Carver v. Consolidated Rail Corporation,* 600 F. Supp. 125 (E.D. Pa. 1984). Both district court opinions acknowledge the general congressional intent to provide liberal recovery for injured railroad workers under the FELA. Those courts determined, however, that the provisions of the FELA as enacted and amended represent a considered balancing of the rights and burdens of the parties:

> [I]t is evident that Congress, by enacting FELA, has adjusted the equities between the railroad employer and the injured employee. To grant prejudgment

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(Continued)

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. . . .

> interest would undermine the equities that have been balanced by the Act itself. This court does not believe that prejudgment interest should apply in FELA cases. *Camplese v. Consolidated Rail Corporation, supra,* 594 F. Supp. 48.

More detailed examination of the "adjustment of equities" embodied in the FELA confirms the correctness of the conclusions reached by the Middle and Eastern District Courts of Pennsylvania. The FELA was, for its time, a radical piece of legislation. Even in 1985 FELA plaintiffs occupy a privileged position relative to tort victims pursuing rights and remedies under state common law.[3]

Section 51's provision as to "injury or death resulting in whole or in part from the [railroad's] negligence" renders inapplicable customary principles of proximate cause. *Rogers v. Missouri Pacific R. Co.,* 352 U.S. 500, 77 S. Ct. 443, 1 L.Ed.2d 493 (1957). The FELA abrogated the common law fellow servant doctrine. *Chesapeake & Ohio R. Co. v. De Atley,* 241 U.S. 310, 365 S. Ct. 564, 60 L.Ed. 1016 (1916). Nor does the FELA permit the defense of assumption of the risk. 45 U.S.C. §54. Recovery is on the basis of pure comparative negligence: even a plaintiff who is 99% negligent may obtain partial recovery to the extent of his employer's 1% negligence. 45 U.S.C. §53. Contributory negligence is no defense where harm has resulted from the employer's violation of a safety statute. *Ibid.* Recovery

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[3]FELA plaintiffs, assuming that liability is established, stand to obtain an enormously more lucrative recovery than the vast majority of employees with claims for work-related injuries who have long since been relegated to workers compensation remedies under state or federal law. Given the generally liberal provisions of the FELA, the risk of non-recovery for plaintiffs thereunder is minimal. Indeed, a defense verdict in a FELA action comes as news of the "man bites dog" variety.

under the FELA does not depend on the customary common law requirement of expert testimony that the defendant's negligence is the cause of harm to a reasonable degree of medical certainty. *Sentilles v. Inter-Carribean Shipping Corp.*, 361 U.S. 107, 80 S. Ct. 173, 4 L.Ed.2d 142 (1959).

Although subject to the heavy burdens set forth in the preceding paragraph, FELA defendants have been spared from claims for loss of consortium. *Michigan Central R. Co. v. Vreeland,* 227 U.S. 59, 33 S. Ct. 192, 57 L.Ed 417 (1913). Actions for wrongful death under the FELA may only be maintained for next of kin dependent on a deceased employee, contrary to the broader recovery permitted under some state wrongful death statutes. 45 U.S. §51. *Gulf C. & S.F.Ry. v. McGinnis,* 228 U.S. 173, 33 S. Ct. 426, 57 L.Ed 785 (1913). Similarly, in "survival actions" pursuant to 45 U.S.C. §59 both the items of damages and the class of persons for whom the action may be brought are significantly more limited than in comparable state law tort actions. *Poff v. Pennsylvania R. Co.,* 327 U.S. 399, 66 S. Ct. 603, 90 L.Ed 749 (1946). *Auld v. Terminal R. Assn.,* 463 S.W. 2d 297 (Mo. S. Ct. 1970), *cert. denied* 401 U.S. 940, 91 S. Ct. 938, 28 L.Ed.2d 220 (1971). Plaintiffs in FELA actions may not recover punitive damages. *Kozar v. Chesapeake and Ohio Ry. Co.,* 449 F.2d 1238 (6th Cir. 1971).

And, until the case presently before this Court, railroads had not been burdened by assessment of prejudgment interest on the already generous verdicts routinely rendered in FELA actions. Now, following in the same way of error taken by Pennsylvania Superior Court, the United States District Court for Colorado has also assessed prejudgment interest in a FELA action. *Garcia v. Burlington*

Northern R.R., 597 F. Supp. 1304 (D.C. Colo. 1984), appeal docketed, No. 84-1318, 10th Cir. If this Court declines to grant a Petition for Certorari to the Superior Court of Pennsylvania, the millstone known as the FELA could well become a pair of cement overshoes.

Finally, Congress' 1939 reenactment of the operative language of 45 U.S.C. §51[4] in light of prior decisions holding that prejudgment interest was not recoverable thereunder and Congress' inaction in the face of numerous subsequent holdings to that effect[5] should be viewed as indicating congressional acquiescence in those holdings. *Lorillard v. Pons*, 434 U.S. 575, 98 S. Ct. 866, 55 L.Ed.2d 40 (1978).

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[4]Compare S. Rep. No. 661, 76th Cong. 1st Session 2 (1939) and 84 Cong. Rec. 9406-9407, 11106-11107 with 35 Stat. 65.

[5]Footnote 1, *supra*.

CONCLUSION

A writ of certiorari to the Superior Court of Pennsylvania should be granted to maintain the uniformity of damages recoverable under the Federal Employers' Liability Act and to preserve Congress' considered allocation of the respective rights and burdens of railroads and their employees.

Respectively submitted,

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CERTIFICATE OF SERVICE

The undersigned, who is a member of the Bar of this Court, hereby certifies that three copies of the within Brief of Amici Curiae in Support of Petition for a Writ of Certiorari were served on the following individuals by first class United States mail, postage prepaid on April 26, 1985. I further certify that all persons required to be served have been served.

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